

FILED  
07 JAN 29 PM 4:48  
KING COUNTY  
SUPERIOR COURT CLERK  
KENT, WA

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

D.F.,

Plaintiff,

v.

THE CORPORATION OF THE PRESIDENT OF  
THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS, a Utah Corporation  
sole; and the "MORMON CHURCH" THE  
CHURCH OF JESUS CHRIST OF LATTER-  
DAY SAINTS, an unincorporated association,

Defendants.

NO. 06-2-18131-0 KNT

DECLARATION OF MICHELLE A.  
MENELY IN SUPPORT OF  
PLAINTIFF'S OPPOSITION TO  
DEFENDANT COPRORATION OF THE  
PRESIDENT OF THE CHURCH OF  
JESUS CHRIST OF LATTER-DAY  
SAINTS MOTION TO DISMISS  
AND/OR FOR SUMMARY JUDGMENT

NOTED FOR: FEBRUARY 9, 2007  
9:00 A.M.

THE HONORABLE LAURA INVEEN

I, Michelle A. Menely, hereby certify and declare as follows:

I am one of the attorneys for Plaintiff D.F., in this action. I have personal knowledge  
of and am competent to testify to the facts set forth below.

1. Attached hereto as **Exhibit A** is a true and correct copy of an email dated April  
20, 2006, between counsel regarding naming COP and the unincorporated association (relating  
to the *Rinde vs. COP* matter).

2. Attached hereto as **Exhibit B** is a true and correct copy of the Declaration of  
Timothy D. Kosnoff Re: Reply to Opposition Motion to Amend Complaint to Clarify Status of

DECL. OF M. MENELY RE: PLTF. OPP. TO DEF. MSJ - 1  
06-2-18131-0 KNT  
[175210 v02.doc]

ORIGINAL

1 Defendants and Motion to Remand, dated May 26, 2006 (without attachments) (relating to the  
2 *Rinde vs. COP* matter). Attached hereto as **Exhibit B-1** is a true and correct copy of the  
3 plaintiff's Motion to Amend Compliant to Clarify Status of Defendants and Motion to Remand,  
4 along with the Reply Brief (filed in the *Rinde* matter).

5 3. Attached hereto as **Exhibit C** is a true and correct copy of the Order dated June  
6 30, 2006, from United States District Judge Zilly regarding Plaintiff's Motion to Amend  
7 Complaint to Clarify Status of Defendants, Plaintiff's Motion to Remand back to King County  
8 Superior Court (pertaining to the *Rinde* matter).

9 4. The *R.K.* case was set for trial to commence on October 2, 2006 –  
10 approximately five months after the Motion to Amend/Remand briefs were submitted to  
11 Judge Zilly. In the week or two prior to commencement of trial, the parties exchanged  
12 proposed jury instructions – including the instruction in which COP admitted it "stands in the  
13 shoes of the church."

14 5. Attached hereto as **Exhibit D** is a true and correct copy of the Answer to  
15 Defendants Gregory Foster, the Church of Jesus Christ of Latter-Day Saints, Corporation of  
16 the President and Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-  
17 Day Saints to Plaintiff's Third Amended Complaint.

18 6. Attached hereto as **Exhibit E** is a true and correct copy of Judge Aiken's  
19 Opinion and Order in *Scott*.

20 7. Attached hereto as **Exhibit F** is a true and correct copy of a case in which COP  
21 was the Plaintiff in the case.

22 8. Attached hereto as **Exhibit G** is a true and correct copy of a case in which COP  
23 was the Defendant in the case.

24 9. Attached hereto as **Exhibit H** is a true and correct copy of a case involving COP  
25 in an employment case.

26  
DECL. OF M. MENELY RE: PLTF. OPP. TO DEF. MSJ - 2  
06-2-18131-0 KNT  
[175210 v02.doc]

11. Attached hereto as **Exhibit J** is a true and correct copy of the Church Defendants' Reply on their Motion for Judicial Determination of Diversity Jurisdiction in *Scott*.

13. Attached hereto as **Exhibit L** is a true and correct copy of the General Handbook of Missions, published by The Church of Jesus Christ of Latter-day Saints.

15. Attached hereto as **Exhibit N** is a true and correct copy of copies of articles where Gordon G. Conger has been appointed as a spokesman on behalf of the Mormon Church.

Dated this 27<sup>th</sup> day of January, 2007 at Seattle, Washington

Michelle A. Menely

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 29 day of January, 2007, I did serve true and correct copies of the foregoing via facsimile and via ABC Legal Messengers by directing delivery to and addressed to the following:

*Counsel for COP.:*

Charles Gordon, Esq.

Jeffrey Tilden, Esq.

Michael Rosenberger, Esq.

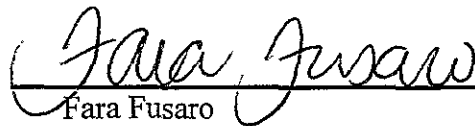
GORDON MURRAY TILDEN

1325 Fourth Avenue, Suite 1800

Seattle, WA 98101

TEL: 206.467.6477

FAX: 206.467.6292



Fara Fusaro

Legal Assistant to Michelle A. Menely

DECL. OF M. MENELY RE: PLTF. OPP. TO DEF. MSJ - 4  
06-2-18131-0 KNT  
[175210 v02.doc]

## **EXHIBIT A**

**Menely, Michelle**

**From:** Tim Kosnoff [timkosnoff@comcast.net]  
**Sent:** Thursday, April 20, 2006 9:35 AM  
**To:** Michelle 8Menely  
**Subject:** FW: FW: RE: Diversity etc.

--- Original Message---

To: Michael 2Pfau <pfaum@gth-law.com>  
Cc: John Schulz <JRS@mcgrannshea.com>  
From: TDK  
Sent: 4/20/2006 9:22AM  
Subject: FW: RE: Diversity etc.

>> --- Original Message---

>> To: "Tim Kosnoff" <timkosnoff@comcast.net>  
>> Cc: "Jeff Tilden" <jtilden@gmtlaw.com>  
>> From: "Chuck Gordon" <cgordon@gmtlaw.com>  
>> Sent: 4/20/2006 9:20AM  
>> Subject: RE: Diversity etc.

>>  
>> >> Tim, we will follow up on this and review the issue with our  
>> >> client. We will get back to you shortly. We will get your address  
>> >> corrected. Regards, Chuck

>> >> -----Original Message-----

>> >> From: Tim Kosnoff [mailto:timkosnoff@comcast.net]  
>> >> Sent: Thursday, April 20, 2006 9:11 AM  
>> >> To: Chuck Gordon; Michael 2Pfau  
>> >> Subject: Diversity etc.

>> >>  
>> >> Chuck,  
>> >>  
>> >> Attached is the docket in Scott v. COJCOLDS, et al from US Dist  
>> >> Court D. Oregon in which your client successfully argued the same  
>> >> position it would now be opposing if you remove. I believe the  
>> >> complaint sufficiently reflects that both entities, COP and the  
>> >> unincorporated association are named. If the court thinks  
>> >> otherwise, we will merely amend to make that clear. To me, this is  
>> >> a battle that doesn't make any sense for us to fight.

>> >>  
>> >> On another note, I saw you have my old Bellevue address. You  
>> >> should correct your files to reflect my present office address  
>> >> noted below.

>> >>  
>> >> Thank you for your cooperation.

>> >>  
>> >> Tim

>> >>  
>> >> Timothy D. Kosnoff  
>> >> Law Offices of Timothy D. Kosnoff, P.C.  
>> >> One Union Square  
>> >> 600 University St., Suite 2101  
>> >> Seattle, WA 98101

>> >>  
>> >> 206-676-7610  
>> >> 425-837-9690

>> >> 425-837-9622  
>> >> timkosnoff@comcast.net  
>> >> \*\*\*\*\*  
>> >> \*\*\*\*\*  
>> >> \*\*\*\*\*  
>> >> This e-mail may contain information that is privileged, confidential or  
>> >> otherwise protected from disclosure. If you are not the intended  
>> >> recipient or otherwise have received this message in error, you are not  
>> >> authorized to read, print, retain, copy or disseminate this message or  
>> >> any part of it. If you are not the intended recipient or otherwise have  
>> >> received this message in error, please notify the sender immediately by  
>> >> e-mail, discard any paper copies and delete all electronic files of the  
>> >> message.  
>> >> Thank you.  
>> >> \*\*\*\*\*  
>> >> \*\*\*\*\*  
>> >>  
>> >>  
>> >>  
>>

## **EXHIBIT B**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROB RINDE f/k/a ROBERT LARRY LEROY  
PITSOR, JR.

Plaintiff,

vs.

THE CORPORATION OF THE PRESIDENT  
OF THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS, a Utah corporation  
sole, aka the "MORMON CHURCH" THE  
CHURCH OF JESUS CHRIST OF LATTER-  
DAY SAINTS, an unincorporated association,

Defendant.

NO. 2:06-CV-00556TSZ

DECLARATION OF TIMOTHY D.  
KOSNOFF RE: REPLY TO OPPOSITION  
MOTION TO AMEND COMPLAINT TO  
CLARIFY STATUS OF DEFENDANTS  
AND MOTION TO REMAND

NOTED FOR: FRIDAY, MAY 26, 2006

TIMOTHY D. KOSNOFF, being first duly sworn on oath, states as follows:

1. I am one of the attorneys for the plaintiff in this matter; I make this declaration based on my own personal knowledge.

2. Shortly before receipt of the defendant's Notice of Appearance/Notice of Removal, I had a telephone conversation with defense counsel, Chuck Gordon. During that

KOSNOFF DECL. RE: REPLY TO OPP. TO MTN TO  
AMEND/REMAND - 1 of 3  
(2:06-CV-00556TSZ)  
[164446 v03.doc]

LAW OFFICES  
GORDON, THOMAS, HONEYWELL, MALANCA,  
PETERSON & DAHEIM LLP  
ONE UNION SQUARE  
600 UNIVERSITY, SUITE 2100  
SEATTLE, WASHINGTON 98101-4185  
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1 conversation, Mr. Gordon advised me that it was COP's intention to remove this action to this  
2 Court.

3 3. In response, I advised Mr. Gordon that (a) that the Mormon Church was a  
4 defendant and (b) this issue of whether there was diversity of citizenship in an action in which  
5 the Mormon Church was a named defendant had already been resolved by a United States  
6 District Court Judge (and that the judge had found that the inclusion of the Mormon Church  
7 as a defendant indeed destroyed diversity). I specifically requested that in this circumstance  
8 COP not file the removal.

9 4. Attached hereto as **Exhibit A** is a true and correct copy of the face sheets from  
10 the cases cited in Section C of Plaintiff's Reply to Defendant's Opposition to Motion to  
11 Amend/Remand.

12 5. Attached hereto as **Exhibit B** is a true and correct copy of the Answer in the  
13 case of *Scott v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-*  
14 *day Saints*, U.S.D.C., Oregon District, Cause No. 98-366AA.

15  
16 I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS  
17 TRUE AND CORRECT.

18  
19 DATED at Seattle, Washington, this 26<sup>th</sup> day of May, 2006.

20  
21 /s/ Timothy D. Kosnoff  
22 Timothy D. Kosnoff

23  
24  
25  
26 KOSNOFF DECL. RE: REPLY TO OPP. TO MTN TO  
AMEND/REMAND - 2 of 3  
(2:06-CV-00556TSZ)  
[164446 v3.doc]

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PETERSON & DAHEIM LLP  
ONE UNION SQUARE  
600 UNIVERSITY, SUITE 2100  
SEATTLE, WASHINGTON 98101-4185  
(206) 676-7500 • FACSIMILE (206) 676-7575

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on May 26, 2006, I electronically filed the foregoing  
**DECLARATION OF TIMOTHY D. KOSNOFF RE: REPLY TO OPPOSITION TO  
MOTION TO AMEND COMPLAINT TO CLARIFY STATUS OF DEFENDANTS  
AND MOTION TO REMAND** with the Clerk of the Court using the CM/ECF system which  
will send notification of such filing to the following:

Charles C. Gordon <a href="mailto:cgordon@gmtlaw.com">cgordon@gmtlaw.com</a> Jeffrey I. Tilden <a href="mailto:jtilden@gmtlaw.com">jtilden@gmtlaw.com</a> 1001 Fourth Avenue, Suite 4000 Seattle, WA 98154 PH: 206.467.6477 FX: 206.467.6292	
---	--

DATED this 16<sup>th</sup> day of May, 2006.

/s/ Bernadette Lovell

Legal Assistant to Michelle A. Menely

KOSNOFF DECL. RE: REPLY TO OPP. TO MTN TO  
AMEND/REMAND - 3 of 3  
(2:06-CV-00556TSZ)  
[164446 v03.doc]

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PETERSON & DAHEIM LLP  
ONE UNION SQUARE  
600 UNIVERSITY, SUITE 2100  
SEATTLE, WASHINGTON 98101-4105  
(206) 676-7500 • FACSIMILE (206) 676-7575

## **EXHIBIT B-1**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROB RINDE f/k/a ROBERT LARRY LEROY  
PITSOR, JR.

Plaintiff,

vs.

THE CORPORATION OF THE PRESIDENT  
OF THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS, a Utah corporation  
sole, aka the "MORMON CHURCH" THE  
CHURCH OF JESUS CHRIST OF LATTER-  
DAY SAINTS, an unincorporated association,

Defendant.

NO. 2:06-CV-00556TSZ

MOTION TO AMEND COMPLAINT TO  
CLARIFY STATUS OF DEFENDANTS  
AND MOTION TO REMAND

NOTED FOR: FRIDAY, MAY 26, 2006

I. INTRODUCTION

COMES NOW plaintiff above-named, by and through his counsel of record, and  
moves this Court to amend the Complaint to clarify the status of the two defendants in the  
action and to remand the matter to the King County Superior Court.

MOTION TO AMEND/REMAND - 1 of 5  
(2:06-CV-00556TSZ)  
[163699 v03.doc]

LAW OFFICES  
GORDON, THOMAS, HONEYWELL, MALANCA,  
PETERSON & DAHEIM LLP  
ONE UNION SQUARE  
800 UNIVERSITY, SUITE 2100  
SEATTLE, WASHINGTON 98101-4185  
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## II. STATEMENT OF RELEVANT FACTS

Plaintiff filed this action on March 22, 2006, in the King County Superior Court. In doing so, plaintiff intended to name to two defendants – The Corporation of the President of the Church of Jesus Christ of Latter-day Saints ("COP") and the Mormon Church itself.<sup>1</sup>

Believing that the plaintiff had named only one defendant, defendant COP appeared through counsel and filed a Notice of Removal. While not conceding that the original complaint was inaccurate, in order to clarify the claims being asserted, plaintiff moves this Court to allow it to amend his complaint to clarify that there are, in fact, two defendants in the action. The proposed Amended Complaint is attached as **Exhibit A** to the Declaration of Timothy D. Kosnoff, filed herewith.<sup>2</sup>

Additionally, because the second defendant is an "unincorporated association," there is not complete diversity of citizenship. Consequently, plaintiff also moves this Court to remand this action to the King County Superior Court.

## III. STATEMENT OF ISSUES

1. Whether this Court should grant plaintiff leave to amend the Complaint when the action has only just commenced, when discovery has not commenced on this matter, when the amendment is limited to clarifying that plaintiff is pursuing claims against two defendants and when allowing the amendment will not prejudice any of the parties to this action?

2. Whether this Court should remand this matter to the King County Superior Court when there is not complete diversity of citizenship between the parties.

<sup>1</sup> While it may not have been entirely clear from the Complaint itself, the paragraph identifying the parties, indicates that there are two defendants: (1) the corporation itself and (2) the church that the corporation operates – the Mormon Church. *See Complaint*, ¶2.2.

<sup>2</sup> For the Court and counsel's reference, a red-lined version of the proposed Amended Complaint is as to the Kosnoff Declaration as **Exhibit B**.

#### IV. EVIDENCE RELIED UPON

This motion is based upon the records and files herein, upon the declaration of Michelle A. Menely, and attachment thereto, and upon the files and records herein.

#### V. LEGAL AUTHORITY

##### A. MOTION TO AMEND.

FRCP 15(a) provides that once the defendant has filed a responsive pleading, the plaintiff must move for leave of court to amend the complaint. Leave to amend the complaint "shall be freely given when justice so requires." FRCP 15(a). Here, defendant has not filed a "responsive pleading," but has filed a Notice of Removal. While a Notice of Removal is not a "responsive pleading," plaintiffs nevertheless seek leave of Court to amend the Complaint.

Neither defendant COP nor defendant the Mormon Church will be prejudiced by this amendment. First, as indicated herein, in preparing the Complaint, plaintiff intended to name two defendants – COP and the Mormon Church. The amendment is limited to clarifying that there are in fact two entities to this litigation. Furthermore, discovery has not yet commenced in this action and a trial date is not yet set.

##### B. MOTION TO REMAND.

In diversity case, a federal Court has jurisdiction over a matter only if there is complete diversity of citizenship between the parties to the action. 28 U.S.C. §1332(a). The citizenship of an unincorporated association for purposes of federal diversity jurisdiction is the citizenship of each of the individual members of the association. *Carden v. Arkoma Assoc.*, 494 U.S. 185, 189, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990); *see, also, Brown v. Protestant Episcopal Church*, 8 F.2d 149 (E.D. La. 1925).

Here, as admitted by COP in other matters, the Mormon church itself has asserted that it is an "unincorporated association," with "millions of members worldwide" and,

MOTION TO AMEND/REMAND - 3 of 5  
(2:06-CV-00556TSZ)  
[163699 v03.doc]

LAW OFFICES  
GORDON, THOMAS, HONEYWELL, MALANCA,  
PETERSON & DAHEIM LLP  
ONE UNION SQUARE  
600 UNIVERSITY, SUITE 2100  
SEATTLE, WASHINGTON 98101-4185  
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consequently, admitted that it is not a member of any given state.<sup>3</sup> From this statement, plaintiff can surmise that the Mormon church has members in Utah (the state of "residence" of defendant COP), the plaintiff's current state of residence, Minnesota, and his former state of residence, Washington. Consequently, there is not complete diversity of citizenship and this Court should remand this action to the King County Superior Court.

#### VI. CONCLUSION

For the above-stated reasons, plaintiff respectfully requests that this Court permit him to file an amended complaint which is limited to clarifying that there are two defendants in this action and to grant the motion to remand to state court.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of May, 2006.

GORDON, THOMAS, HONEYWELL,  
MALANCA, PETERSON & DAHEIM LLP

By: Michael T. Pfau  
Michael T. Pfau, WSBA No. 24649  
[mpfau@gth-law.com](mailto:mpfau@gth-law.com)  
Michelle A. Menely, WSBA No. 28353  
[mmenely@gth-law.com](mailto:mmenely@gth-law.com)  
Co-Counsel for Plaintiff

LAW OFFICES OF TIMOTHY D. KOSNOFF

By: Timothy D. Kosnoff  
Timothy D. Kosnoff, WSBA No. 16586  
[timkosnoff@comcast.net](mailto:timkosnoff@comcast.net)  
Co-Counsel for Plaintiff

<sup>3</sup> See, pg. 3 of Church Defendants' Reply on their Motion for Judicial Determination of Diversity Jurisdiction, filed *Scott v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints*, U.S.D.C. District of Oregon, Cause No. 98-366AA (attached as Exhibit C to Declaration of Timothy D. Kosnoff.)

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on May 16, 2006, I electronically filed the foregoing **MOTION TO AMEND COMPLAINT TO CLARIFY STATUS OF DEFENDANTS AND MOTION TO REMAND** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Charles C. Gordon <u>cgordon@gmtlaw.com</u> Jeffrey I. Tilden <u>jtilden@gmtlaw.com</u> 1001 Fourth Avenue, Suite 4000 Seattle, WA 98154 PH: 206.467.6477 FX: 206.467.6292	
---	--

DATED this 16<sup>th</sup> day of May, 2006.

/s/Nicole Calvert  
Nicole Calvert  
Legal Assistant to Michelle A. Menely

MOTION TO AMEND/REMAND - 5 of 5  
(2:06-CV-00556TSZ)  
[163699 v03.doc]

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PETERSON & DAHEIM LLP  
ONE UNION SQUARE  
600 UNIVERSITY, SUITE 2100  
SEATTLE, WASHINGTON 98101-4185  
(206) 676-7500 • FACSIMILE (206) 676-7575

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROB RINDE f/k/a ROBERT LARRY LEROY  
PITSOR, JR.

Plaintiff,

vs.

THE CORPORATION OF THE PRESIDENT  
OF THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS, a Utah corporation  
sole, aka the "MORMON CHURCH" THE  
CHURCH OF JESUS CHRIST OF LATTER-  
DAY SAINTS, an unincorporated association,

Defendant.

NO. 2:06-CV-00556TSZ

PLAINTIFF'S REPLY TO DEFENDANT'S  
OPPOSITION TO PLAINTIFF'S MOTION  
TO AMEND COMPLAINT TO CLARIFY  
STATUS OF DEFENDANTS AND  
MOTION TO REMAND

NOTED FOR: FRIDAY, MAY 26, 2006

I. INTRODUCTION

In its opposition, defendant COP takes the position that plaintiff is attempting to add a new party to this action in order to defeat diversity. However, as was indicated in plaintiff's original moving papers, plaintiff is not moving to add a new party to this action. Instead, plaintiff simply moved this Court to amend his complaint to clarify that he had instituted an action against two separate entities – (1) The Corporation of the President of the Church of

REPLY TO OPP. TO MOTION TO AMEND/REMAND - 1 of 8  
(2:06-CV-00556TSZ)  
[164343 v07.doc]

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GORDON, THOMAS, HONEYWELL, MALANCA,  
PETERSON & DAHEIM LLP  
ONE UNION SQUARE  
600 UNIVERSITY, SUITE 2100  
SEATTLE, WASHINGTON 98101-4185  
(206) 676-7500 • FACSIMILE (206) 676-7575

1 Jesus Christ of Latter-day Saints and (2) The Church of Jesus Christ of Latter-Day Saints,  
2 a/k/a the Mormon Church itself. Plaintiff reiterates that request in this reply to defendant's  
3 opposition.

## 4 II. STATEMENT OF RELEVANT FACTS

5 On March 22, 2006, plaintiff filed an action in the King County Superior Court and, in  
6 doing so, named two defendants -- COP and the Mormon Church.<sup>1</sup> On or about April 20,  
7 2006 plaintiff received a Notice of Appearance on behalf of defendant COP and a Notice of  
8 Removal (Diversity Jurisdiction). Shortly before the Notice of Appearance and Notice of  
9 Removal was filed, a telephone conversation occurred between plaintiff's counsel, Tim  
10 Kosnoff, and defense counsel, Chuck Gordon. During that conversation, Mr. Gordon advised  
11 that it was COP's intention to remove the action based on diversity. In response, plaintiff's  
12 counsel specifically advised Mr. Gordon that (a) the Mormon Church was a defendant and  
13 (b) the issue of whether there was diversity of citizenship in an action in which the Mormon  
14 Church was a named defendant had already been resolved by a United States District Court  
15 Judge (and that the judge had found that the inclusion of the Mormon Church as a defendant  
16 indeed destroyed diversity).<sup>2</sup> As a result of the prior ruling on this issue, plaintiff requested  
17 that COP not take any steps to remove this action.<sup>3</sup> Unfortunately, COP declined  
18 necessitating this motion.

## 19 III. ARGUMENT

### 20 A. DEFENDANT'S RELIANCE ON CASE LAW PERTAINING TO WHEN A PLAINTIFF MAY 21 ADD AN ADDITIONAL PARTY IS MISPLACED.

22 As explained in the moving papers, plaintiff intended to name, and did name, two  
23 defendants in this action -- COP and the Mormon Church itself. Defendant COP took the  
24

25 <sup>1</sup> See *Plaintiff's Complaint*, ¶2.2.

26 <sup>2</sup> *Declaration of Timothy D. Kosnoff*, ¶2 & 3.

<sup>3</sup> *Id.*

REPLY TO OPP. TO MOTION TO AMEND/REMAND - 2 of 8  
(2:06-CV-00556TSZ)  
[164343 v07.doc]

LAW OFFICES  
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PETERSON & DAHEIM LLP  
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1 position that only one defendant had been named and, based on that position, removed the  
2 action to this Court. While not agreeing that plaintiff failed to adequately plead the existence  
3 of two defendants, plaintiff determined that the best way to resolve the dispute was to amend  
4 the complaint to **clarify** the allegations. However, at no point, did plaintiff seek to name an  
5 additional party.<sup>4</sup> Consequently, defendant's reliance on case law pertaining to when a  
6 plaintiff may add an additional party is misplaced.  
7

8 **B. PLAINTIFF'S CLAIMS AGAINST THE MORMON CHURCH ARE NOT FUTILE**

9 Defendant asserts that because plaintiff has named COP in this action, the inclusion of  
10 the Mormon Church is futile. However, plaintiff, at this juncture, is not sure whether COP  
11 will defend this claim by asserting that it did not prescribe the policies and practices of the  
12 local wards of the Mormon Church or that it is not the entity responsible for the acts or  
13 inactions of the Bishops, Stake Presidents and other officials involved in this case. If COP so  
14 defends, and if COP is successful in asserting such defenses, in the absence of the Mormon  
15 Church as a named defendant, plaintiff could be left with an "empty chair" defendant. Thus,  
16 faced with such possible defenses the inclusion of the Mormon Church is not futile to  
17 plaintiff's pursuit of his claims.  
18

19 In addition, the fact that the Mormon Church does or does not have any assets  
20 available to satisfy a judgment does not render the inclusion of the Mormon Church "futile."  
21 The plaintiff's claims arise out of the sexual abuse he suffered as a child. It is inconceivable  
22 that the plaintiff would be deemed to be partially at fault for his harms. Thus, liability against  
23 the defendants will, presumably, be joint and several pursuant to RCW 4.22.070(b).<sup>5</sup>  
24

25 <sup>4</sup> See Motion to Amend and Remand, on file herein.

26 <sup>5</sup> However, if COP is willing to stipulate that all the stake presidents, bishops and other hierarchal officials are agents of COP and that it will not assert an empty chair defense with respect to the persons involved in this case (and its officials) plaintiff will withdraw this motion.

REPLY TO OPP. TO MOTION TO AMEND/REMAND - 3 of 8  
(2:06-CV-00556TSZ)  
[164343 v07.doc]

LAW OFFICES  
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1 Finally, plaintiff is not "forum" shopping. Instead, absent a fraudulent joinder a  
2 "plaintiff has the right to select the forum, to elect whether to sue joint tortfeasors and to  
3 prosecute his own suit in his own way to final determination." *Parks v. New York Times*, 308  
4 F.2d 474, 478 (5<sup>th</sup> Cir. 1962). Here, plaintiff chose to bring his action in King County  
5 Superior Court. Prior to the filing of the Notice of Removal, COP was advised of plaintiff's  
6 position with regard to the existence of two named defendants and that diversity did not exist.  
7 In this circumstance, plaintiff's choice of where to file an action cannot reasonably be  
8 considered "forum" shopping.  
9

10 **C. REPORTED CASES INDICATE THAT THE MORMON CHURCH HAS SUED AND BEEN**  
11 **SUED.**

12 Defendant asserts that because COP exists, the Mormon Church is not an entity that  
13 can sue or be sued. In support of this assertion, COP asserts it is the entity that has employees  
14 and possesses assets (and that the Mormon Church, itself, has none).<sup>6</sup> However, reported  
15 cases from around the country indicate that the Mormon Church itself has been involved in  
16 litigation, both as a plaintiff and as a defendant, on numerous occasions, that it has employees  
17 and that it possesses assets.

18 The Mormon Church is the named plaintiff in the following actions:

- 19 • *Church of Jesus Christ of Latter-day Saints vs. Jefferson County*,  
20 741 F.Supp. 1522 (N.D. Ala. 1990) ("church which unsuccessfully  
21 applied for rezoning to allow development of land for place of  
22 worship filed action against county. . . .")  
23 • *Church of Jesus Christ of Latter-day Saints vs. Jefferson County*,  
24 *Alabama*, 721 F.Supp. 1212 (N.D. Ala. 1989) ("vendors of property  
25 and purchaser, a church, brought action challenging denial of  
26 zoning change to all construction of worship facility on the  
property. . . .")

---

<sup>6</sup> See Opposition to Motion to Amend/Remand, pg. 2, ll. 21-33.

- *Stotts v. Church of Jesus Christ of Latter-Day Saints vs. Lindsey Constr. Co.*, 882 P.2d 1106 (Okla. App. 1994) (in defending claim against it, church defendant instituted a third party complaint).

The Mormon Church, itself, was the named defendant in the following cases:

- *Davis v. Church of Jesus Christ of Latter-Day Saints*, 852 P.2d 640 (Mont. 1993) (defended fraud claim)
- *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 1999 (4<sup>th</sup> Cir. 1997) (defended copyright infringement action);
- *Church of Jesus Christ of Latter-Day Saints v. Superior Court of State of Arizona*, 714 P.2d 431 (Ariz. App. 1985) (defending claim by parents of child who was killed after being struck by an automobile when he rode his bicycle from church parking lot into city street);
- *Church of Jesus Christ of Latter-Day Saints v. Superior Court of State of Arizona*, 764 P.2d 759 (Ariz. App. 1988) (defending claim by mother of victim of child abuse).<sup>7</sup>

The reported cases indicate that the Mormon Church, itself, has employees:

- *Church of Jesus Christ of Latter-day Saints vs. Industrial Commission of Arizona*, 724 P.2d 581 (Ariz. App. 1986) (claimant was "injured while employed by the Church of Jesus Christ of Latter-Day Saints. . .");
- *Church of Jesus Christ of Latter-Day Saints vs. Industrial Comm'n of Utah*, 590 P.2d 328 (Utah 1979) (case involved workman's compensation claim by a person who was "employed by Plaintiff [the Church]");
- *Schmoyer v. Church of Jesus Christ of Latter-Day Saints*, 343 S.E.2d 551 (N.C. App. 1986) (plaintiff's-decedent was "employed as a custodian at the Church of Jesus Christ of Latter-Day Saints.")

Finally, the issue of whether the Mormon Church itself has no assets is called into question by at least one reported case: *Church of Jesus Christ of Latter-Day Saints v.*

<sup>7</sup> For the Court and counsel's reference, the first page of each of these decisions is attached to the declaration of Timothy D. Kosnoff as Exhibit A.

1 *Scarborough*, 189 F.2d (1951) (plaintiff brought action against the Church to "recover \$7000  
2 which was on deposit with the Church. . .")

3 **D. THE MORMON CHURCH CAN BE SERVED WITH PROCESS.**

4 RCW 4.28.080 provides the process by which a defendant can be served with process.

5 That statute provides, in pertinent part:

6 (10) If the suit be against a foreign corporation. . . . **association**  
7 doing business within this state, to **any** agent, cashier or  
8 secretary thereof.

9 The Mormon Church has multiple agents within this state – any Bishop or other clergy  
10 member would presumably suffice. Furthermore, Gordon B. Hinckley is the President of the  
11 Mormon Church. Service could be accomplished by personal service on Mr. Hinckley.

12 **E. COP HAS ADMITTED THAT THE INCLUSION OF THE MORMON CHURCH AS A**  
13 **DEFENDANT DESTROYS DIVERSITY.**

14 In the case of *Scott v. Corporation of the Presiding Bishop of the Church of Jesus*  
15 *Christ of Latter-Day Saints*, U.S.D.C., District of Oregon (Cause No. 98-366AA) the plaintiff  
16 named four defendants (1) the Corporation of the Presiding Bishop, (2) the Mormon Church  
17 itself, (3) the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints,  
18 and (4) Gregory Lee Foster. All four defendants appeared and answered the Complaint.<sup>8</sup> The  
19 defendants in that action – including COP – then brought a motion for determination of  
20 diversity. Included within the assertions made by COP was the fact that inclusion of the  
21 Mormon Church as a defendant destroyed diversity. In making that prior motion, COP  
22 admitted that "lack of jurisdiction is not waivable," and the jurisdictional defect can be raised  
23  
24

25 <sup>8</sup> See Answer of Defendants Gregory Foster, the Church of Jesus Christ of Latter-day Saints, Corporation of the  
26 President and Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, attached to  
Declaration of Timothy D. Kosnoff, as Exhibit B.

REPLY TO OPP. TO MOTION TO AMEND/REMAND - 6 of 8  
(2:06-CV-00556TSZ)  
[164343 v07.doc]

LAW OFFICES  
GORDON, THOMAS, HONEYWELL, MALANCA,  
PETERSON & DAHEIM LLP  
ONE UNION SQUARE  
600 UNIVERSITY, SUITE 2100  
SEATTLE, WASHINGTON 98101-4185  
(206) 676-7500 • FACSIMILE (206) 676-7575

1 at any time and, thus, sought the judicial determination of diversity.<sup>9</sup> The same situation is  
2 present here – the inclusion of the Mormon Church as a defendant destroys diversity.  
3 Consequently, the case must be remanded to the Superior Court.  
4

#### 5 IV. CONCLUSION

6 For the above-stated reasons, plaintiff respectfully requests that this Court GRANT his  
7 motion to amend and remand.

8 RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of May, 2006.

9 GORDON, THOMAS, HONEYWELL,  
10 MALANCA, PETERSON & DAHEIM LLP

11 By: /s/ Michelle A. Menely

12 Michael T. Pfau, WSBA No. 24649

13 mpfau@gth-law.com

14 Michelle A. Menely, WSBA No. 28353

15 mmenely@gth-law.com

16 Co-Counsel for Plaintiff

17 LAW OFFICES OF TIMOTHY D. KOSNOFF

18 By: /s/ Timothy D. Kosnoff

19 Timothy D. Kosnoff, WSBA No. 16586

20 timkosnoff@comcast.net

21 Co-Counsel for Plaintiff

22  
23  
24  
25  
26 <sup>9</sup> See, Church Defendant's Reply on their Motion for Judicial Determination of Diversity Jurisdiction, pg. 3, ll. 19-20, attached to Plaintiff's Motion to Amend/Remand.

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on May 26, 2006, I electronically filed the foregoing **REPLY TO OPPOSITION TO MOTION TO AMEND COMPLAINT TO CLARIFY STATUS OF DEFENDANTS AND MOTION TO REMAND** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Charles C. Gordon <a href="mailto:cgordon@gmtlaw.com">cgordon@gmtlaw.com</a> Jeffrey I. Tilden <a href="mailto:jtilden@gmtlaw.com">jtilden@gmtlaw.com</a> 1001 Fourth Avenue, Suite 4000 Seattle, WA 98154 PH: 206.467.6477 FX: 206.467.6292	
---	--

DATED this 16<sup>th</sup> day of May, 2006.

/s/ Bernadette Lovell

Legal Assistant to Michelle A. Menely

REPLY TO OPP. TO MOTION TO AMEND/REMAND - 8 of 8  
(2:06-CV-00556TSZ)  
[164343 v07.doc]

LAW OFFICES  
GORDON, THOMAS, HONEYWELL, MALANCA,  
PETERSON & DAHEIM LLP  
ONE UNION SQUARE  
600 UNIVERSITY, SUITE 2100  
SEATTLE, WASHINGTON 98101-4185  
(206) 876-7500 • FACSIMILE (206) 678-7575

## **EXHIBIT C**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROB RINDE f/k/a ROBERT LARRY  
LEROY PITSOR, JR.,

Plaintiff,

v.

THE CORPORATION OF THE  
PRESIDENT OF THE CHURCH OF JESUS  
CHRIST OF LATTER-DAY SAINTS, a Utah  
corporation sole, aka the "MORMON  
CHURCH" THE CHURCH OF JESUS  
CHRIST OF LATTER-DAY SAINTS, an  
unincorporated association,

Defendant.

No. C06-556Z

ORDER

This matter comes before the Court on Plaintiff's Motion to Amend Complaint to Clarify Status of Defendants and Motion to Remand, docket no. 5. The Court being fully advised now GRANTS the motions as set forth in this Order:

**Plaintiff's Motion to Amend Complaint to Clarify Status of Defendants**

Plaintiff, Rob Rinde, failed to plead the existence of two defendants in his Complaint. See Compl., docket 3. The Court therefore construes Plaintiff's Motion to Amend Complaint to Clarify Status of Defendants as a motion to join the "'Mormon Church' The Church of Jesus Christ of Latter-Day Saints" (hereinafter referred to as the "Mormon Church") as a defendant.

MINUTE ORDER 1-

1 The Mormon Church is an unincorporated association with members in all fifty states.  
2 Rytting Decl., docket 7, ¶ 5; Def.'s Opp'n, docket 6, at 2. It is well-established that the  
3 citizenship of unincorporated associations is the citizenship of each of the individual  
4 members of the association. Johnson v. Columbia Props. Anchorage, 437 F.3d 894, 899 (9th  
5 Cir. 2006). Thus, the Mormon Church is a non-diverse defendant.

6 "[T]he proper standard for deciding whether to allow post-removal joinder of a  
7 diversity-destroying defendant is set forth in 28 U.S.C. § 1447(e)." Boon v. Allstate Ins.  
8 Co., 229 F. Supp. 2d 1016, 1020 n.2 (C.D. Cal. 2002). Section 1447(e) provides: "If after  
9 removal the plaintiff seeks to join additional defendants whose joinder would destroy subject  
10 matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to  
11 the State court." 28 U.S.C. § 1447(e). Joinder of a diversity-destroying defendant pursuant  
12 to Section 1447(e) is left to the discretion of the district court. Newcombe v. Adolf Coors  
13 Co., 157 F.3d 686, 691 (9th Cir. 1998).

14 Having considered the six factors described in Boon, 229 F. Supp. 2d at 1019-20, the  
15 Court concludes that permitting joinder under Section 1447(e) is appropriate in the present  
16 case. Permitting joinder of the Mormon Church would facilitate a just adjudication of the  
17 matter. Conversely, disallowing joinder would hinder Mr. Rinde from asserting his rights  
18 against an entity allegedly involved in the breach of duties and related causes of action. See  
19 IBC Aviation Servs., Inc. v. Compania Mexicana de Aviacion, 125 F. Supp. 2d 1008, 1012  
20 (N.D. Cal. 2000). The absence of the Mormon Church as a named defendant could preclude  
21 Mr. Rinde from recovering damages for any fault attributable to the Mormon Church. See  
22 Kottler v. Wetherington, 136 Wn.2d 437, 445-47 (1998). In contrast, "[t]here will be little  
23 prejudice to Defendant[] from allowing amendment and remand at such an early stage in the  
24 case." Palestini v. Gen. Dynamics Corp., 193 F.R.D. 654, 657 (S.D. Cal. 2000). Although  
25 Defendant Corporation of the President of the Church of Jesus Christ of Latter-Day Saints  
26 ("COP") argues that Mr. Rinde's sole purpose for seeking joinder is to destroy diversity

1 jurisdiction, the Court "declines to impute an improper motive to Plaintiff simply because  
2 Plaintiff seeks to add a non-diverse defendant post-removal." IBC Aviation Servs., 125 F.  
3 Supp. 2d at 1012.

4 COP also contends that the Mormon Church is not a proper party because once a  
5 religious entity has chosen to incorporate, only the corporate form may be sued. The cases  
6 cited by COP, however, merely support the general rule that religious controversies are not  
7 the proper subject of civil court inquiry. See, e.g., Islamic Ctr. of Harrison, Inc. v. Islamic  
8 Science Found., Inc., 628 N.Y.S. 2d 179, 179 (App. Div. 1995). Although the Free Exercise  
9 Clause of the United States Constitution "restricts the government's ability to intrude into  
10 ecclesiastical matters or to interfere with a church's governance of its own affairs," Bollard  
11 v. California Province of the Soc'y of Jesus, 196 F.3d 940, 945 (9th Cir. 1999), a religious  
12 association does not operate wholly free from civil law. "The First Amendment does not  
13 provide churches with absolute immunity to engage in tortious conduct. So long as liability  
14 is predicated on secular conduct and does not involve the interpretation of church doctrine or  
15 religious beliefs, it does not offend constitutional principles." C.J.C. v. Corp. of Catholic  
16 Bishop of Yakima, 138 Wn.2d 699, 728 (1999) (citing Sanders v. Casa View Baptist Church,  
17 134 F.3d 311, 366 (5th Cir. 1998)).

18 For the foregoing reasons, the Court GRANTS Plaintiff's Motion to Amend  
19 Complaint to Clarify Status of Defendants, docket no. 5. The Clerk is directed to file the  
20 Proposed Amended Complaint, attached as Exhibit A to the Kosnoff Decl., docket no. 5.

21 **Plaintiff's Motion to Remand**

22 Diversity jurisdiction requires complete diversity of citizenship between the parties to  
23 an action. 28 U.S.C. § 1332(a); Cardon v. Arkoma Assocs., 494 U.S. 185, 187 (1990). Once  
24 a non-diverse defendant is joined, remand becomes mandatory: "[a] district court may not  
25 allow joinder of a non-diverse party and retain jurisdiction." Stevens v. Brink's Home  
26 Security, Inc., 378 F.3d 944, 949 (9th Cir. 2004); see also 28 U.S.C. § 1447(e). Because the

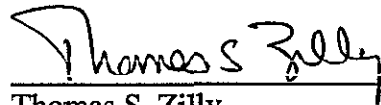
MINUTE ORDER 3-

1 Court is granting Plaintiff's motion to join the Mormon Church as a non-diverse defendant,  
2 remand is mandatory. Accordingly, the Court GRANTS the Plaintiff's Motion to Remand,  
3 docket no. 5.

4 The Clerk is directed to remand the case to King County Superior Court, Case No. 06-  
5 2-09825-1SEA, in accordance with this Order.

6 IT IS SO ORDERED.

7 Filed and entered this 30th day of June, 2006.

8  
9 

10 Thomas S. Zilly  
11 United States District Judge  
12  
13  
14  
15  
16  
17  
18  
19  
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21  
22  
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24  
25  
26

MINUTE ORDER 4-

## **EXHIBIT D**

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DUNN CARNEY ONE

002/012

SC012-1

LF/JMH/BKB/GER

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DUNN, CARNEY

1 Stephen F. English, OSB 73084  
 2 Lori R. Metz, OSB 85286  
 3 Karen M. Vickers, OSB 91381  
 4 BULLIVANT, HOUSER, BAILEY  
 5 A Professional Corporation  
 6 300 Pioneer Tower  
 7 888 SW Fifth Avenue  
 8 Portland, OR 97204-2089  
 9 Telephone: (503) 228-6351  
 10 Facsimile: (503) 295-0915  
 11 E-Mail: stephen.english@bullivant.com  
 12 E-Mail: lori.metz@bullivant.com  
 13 E-Mail: karen.vickers@bullivant.com

14 Attorneys for Defendants

15 IN THE UNITED STATES DISTRICT COURT  
 16 FOR THE DISTRICT OF OREGON

17 JEREMIAH SCOTT,

18 Plaintiff,

19 v.

20 CORPORATION OF THE PRESIDING  
 21 BISHOP OF THE CHURCH OF JESUS  
 22 CHRIST OF LATTER DAY SAINTS, a  
 23 Utah corporation sole;  
 24 GREGORY LEE FOSTER, an  
 25 individual; THE CHURCH OF  
 26 JESUS CHRIST OF LATTER-DAY  
 27 SAINTS, a Utah corporation  
 28 sole; THE CORPORATION OF THE  
 29 PRESIDENT OF THE CHURCH OF  
 30 JESUS CHRIST OF LATTER-DAY  
 31 SAINTS, a Utah corporation  
 32 sole,

33 Defendants.

Civil No. 98-366-AA

ANSWER OF DEFENDANTS GREGORY  
 FOSTER, THE CHURCH OF JESUS  
 CHRIST OF LATTER-DAY SAINTS,  
 CORPORATION OF THE PRESIDENT  
 AND CORPORATION OF THE  
 PRESIDING BISHOP OF THE  
 CHURCH OF JESUS CHRIST OF  
 LATTER-DAY SAINTS TO  
 PLAINTIFF'S THIRD AMENDED  
 COMPLAINT

For their Answer to plaintiff's Third Amended  
 Complaint, defendants Corporation of the Presiding Bishop of The  
 Church of Jesus Christ of Latter-day Saints ("CPB"), Corporation  
 of the President of The Church of Jesus Christ of Latter-day

Page 1 - ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

BULLIVANT HOUSER BAILEY  
 A Professional Corporation  
 888 S.W. Fifth Avenue, Suite 300  
 Portland, Oregon 97204-2089  
 Telephone (503) 228-6351

08/04/98 14:05 FAX 503 224 7324

DUNN CARNEY ONE

003/012

1 Saints ("COP"), and The Church of Jesus Christ of Latter-day  
2 Saints ("the Church") and Gregory Lee Foster ("Foster") (all four  
3 are hereinafter collectively referred to as "Defendants") admit,  
4 deny and affirmatively allege as follows:

5 FIRST DEFENSE

6 Defendants respond to the specific allegations of the  
7 Third Amended Complaint as follows:

8 1. Defendants admit that Plaintiff's claim is civil  
9 in nature and that Plaintiff alleges that it involves a sum,  
10 exclusive of interest and costs, in excess of \$75,000, but deny  
11 that complete diversity of citizenship exists between the parties  
12 to this matter. Defendants deny the remaining allegations of  
13 paragraph 1 of the Third Amended Complaint.

14 2. Defendants admit that given the allegations of the  
15 Complaint, venue appears to be proper in this Court. Defendants  
16 specifically deny that any events or omissions occurred that give  
17 rise to any claim. Defendants deny the remaining allegations of  
18 paragraph 2 of the Third Amended Complaint.

19 PARTIES

20 3. Defendants are without knowledge and information  
21 sufficient to form a belief as to the truthfulness of the  
22 allegations of paragraph 3 and therefore deny the same.

23 4. Defendants admit that Defendant CPB is a  
24 nonprofit, Utah corporation sole organized and existing under the  
25 laws of the State of Utah and with its principal operations in  
26 Utah. Defendants also admit that CPB is registered in the State

Page 2 - ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

GULLIVANT HOUSSER BAILEY  
A Professional Corporation  
863 S.W. Fifth Avenue, Suite 300  
Portland, Oregon 97204-2083  
Telephone (503) 228-8351

08/04/98 14:05 FAX 503 224 7324

DUNN, CARNEY ONE

004/012

1 of Oregon. Defendants deny the remaining allegations of  
2 paragraph 4 of the Third Amended Complaint.

3 5. Defendants admit that Defendant Foster is a  
4 resident of Oregon and that he was the Bishop of the Brentwood  
5 Ward located in Portland, Oregon. Defendants deny the remaining  
6 allegations of paragraph 5 of the Third Amended Complaint.

7 6. Defendants deny the allegations of paragraph 6.  
8 Defendants affirmatively allege that the Church is an  
9 unincorporated association that is not subject to suit.

10 7. Defendants admit that COP is a nonprofit, Utah  
11 corporation sole formed in 1923 with its principal operations in  
12 Utah.

13 RELATIONSHIPS BETWEEN THE DEFENDANTS

14 8. Defendants admit the allegations of paragraph 8,  
15 except to add that the Church has over 10 million members in over  
16 150 countries.

17 9. Defendants admit that the LDS Church is a  
18 hierarchical church. Defendants also admit that its highest  
19 governing councils and quorum are the First Presidency, the  
20 Council of the Twelve Apostles, the First and Second Quorums of  
21 the Seventy, and the Presiding Bishopric. Defendants also admit  
22 that local congregation are known as wards or branches and groups  
23 of wards or branches constitute stakes or districts. Defendants  
24 deny the remaining allegations of paragraph 9 of the Third  
25 Amended Complaint.

26 ///

Page 3 - ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

BULLIVANT HOUSE & BAILEY  
A Professional Corporation  
888 S.W. Fifth Avenue, Suite 300  
Portland, Oregon 97204-2038  
Telephone (503) 228-8351

08/04/98 14:06 FAX 503 224 7324

DUNN CARNEY ONE

005/012

1 10. Defendants admit that the Council of the  
2 Disposition of Tithes consists of the First Presidency, the  
3 Council of Twelve Apostles, and the Presiding Bishopric.  
4 Defendants deny the remaining allegations of paragraph 10 of the  
5 Third Amended Complaint.

6 11. Church defendants are without knowledge and  
7 information sufficient to form a belief as to the truthfulness of  
8 the allegations that the Scotts regularly attended Church  
9 meetings and therefore deny the same. Defendants admit that the  
10 Scott family has paid tithing to the Church. Defendants also  
11 admit that the law of tithing requires all to give 10% of their  
12 annual increase to the Lord. Defendants deny the remaining  
13 allegations of paragraph 11 of the Third Amended Complaint.

14 12. Defendants deny the allegations of paragraph 12 of  
15 the Third Amended Complaint.

16 13. Defendants admit that COP and CPB were organized  
17 and exist to acquire, hold, and dispose of property on behalf of  
18 the Church. Defendants deny the remaining allegations of  
19 paragraph 13 of the Third Amended Complaint.

20 14. Defendants admit that CPB was organized in 1916 to  
21 acquire, hold, and dispose of property for the Church.  
22 Defendants also admit that CPB holds title to many ward buildings  
23 and related real property. Defendants deny the remaining  
24 allegations of paragraph 14.

25 15. Defendants deny the allegations of paragraph 15 of  
26 the Third Amended Complaint.

Page 4 - ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

BULLVANT Houser BAILEY  
A Professional Corporation  
688 S.W. Fifth Avenue, Suite 200  
Portland, Oregon 97204-2082  
Telephone (503) 228-6351

08/04/98 14:06 FAX 503 224 7324

DUNN CARNEY ONE

0006/012

1 16. Defendants admit that a publication entitled  
2 "Child Abuse, Helps for Ecclesiastical Leaders" was published in  
3 1985. Defendants deny the remaining allegations of paragraph 16  
4 of the Third Amended Complaint.

5 17. Defendants deny the allegations of paragraph 17 of  
6 the Third Amended Complaint.

7 GENERAL ALLEGATIONS

8 18. Defendants admit that the Plaintiff and his  
9 parents were members of the Brentwood Ward. Defendants are  
10 without knowledge and information sufficient to form a belief as  
11 to the truthfulness of the allegations of paragraph 18 and  
12 therefore deny the same.

13 19. Defendant Foster admits that Sandra Scott was a  
14 Sunday School instructor. Defendant Foster denies that Franklyn  
15 Richard Curtis was a Sunday School Teacher or that he had other  
16 leadership positions in the Brentwood Ward. Defendants are  
17 without knowledge and information sufficient to form a belief as  
18 to the truthfulness of the remaining allegations of paragraph 19  
19 and therefore deny the same.

20 20. Defendant Foster admits that Sandra Scott advised  
21 him of her intent to have Curtis live with her family.  
22 Defendants are without knowledge and information sufficient to  
23 form a belief as to the truthfulness of the remaining allegations  
24 of paragraph 20 and therefore deny the same.

25 21. Defendants deny the allegations of paragraph 21 of  
26 the Third Amended Complaint.

Page 5 - ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

GULLMANT HOUSE BAILEY  
A Professional Corporation  
888 S.W. Fifth Avenue, Suite 200  
Portland, Oregon 97204-2022  
Telephone (503) 224-6351

08/04/98 14:08 FAX 503 224 7324

DUNN CARNEY ONE

007/012

1           22. Defendant Foster admits that Curtis lived at the  
2 Scott residence for a period of time in 1990. Defendants are  
3 without knowledge and information sufficient to form a belief as  
4 to the truthfulness of the remaining allegations of paragraph 22  
5 and therefore deny the same.

6           23. Defendants are without knowledge and information  
7 sufficient to form a belief as to the truthfulness of the  
8 allegations of paragraph 23 and therefore deny the same.

9           24. Defendants are without knowledge and information  
10 sufficient to form a belief as to the truthfulness of the  
11 allegations of paragraph 24 and therefore deny the same.

12           25. Defendants are without knowledge and information  
13 sufficient to form a belief as to the truthfulness of the  
14 allegations of paragraph 25 and therefore deny the same.

15           26. Defendants deny the allegations of paragraph 26 of  
16 the Third Amended Complaint.

17           27. Defendants deny the allegations of paragraph 27 of  
18 the Third Amended Complaint.

19           28. Defendants deny the allegations of paragraph 28 of  
20 the Third Amended Complaint.

21           29. Defendants deny the allegations of paragraph 29 of  
22 the Third Amended Complaint.

23           30. Defendants deny the allegations of paragraph 30 of  
24 the Third Amended Complaint.

25           31. Defendants deny the allegations of paragraph 31 of  
26 the Third Amended Complaint.

Page 6 - ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

BULLIVANT HOUSSER BAILEY  
A Professional Corporation  
200 S.W. Fifth Avenue, Suite 500  
Portland, Oregon 97204-2089  
Telephone (503) 228-6351

08/04/98 14:06 FAX 503 224 7324

DUNN CARNEY ONE

008/012

1 32. Defendants deny the allegations of paragraph 32 of  
2 the Third Amended Complaint.

3 33. Defendants deny the allegations of paragraph 33 of  
4 the Third Amended Complaint.

5 34. Defendants deny the allegations of paragraph 34 of  
6 the Third Amended Complaint.

7 35. Defendants deny the allegations of paragraph 35 of  
8 the Third Amended Complaint.

9 36. Defendants deny the allegations of paragraph 36 of  
10 the Third Amended Complaint.

11 37. Defendants deny the allegations of paragraph 37 of  
12 the Third Amended Complaint.

13 38. Defendants deny the allegations of paragraph 38 of  
14 the Third Amended Complaint.

15 39. Defendants deny the allegations of paragraph 39 of  
16 the Third Amended Complaint.

17 40. Defendants deny the allegations of paragraph 40 of  
18 the Third Amended Complaint.

19 41. Defendants deny the allegations of paragraph 41 of  
20 the Third Amended Complaint.

21 42. Defendants deny the allegations of paragraph 42 of  
22 the Third Amended Complaint.

23 43. Defendants deny the allegations of paragraph 43 of  
24 the Third Amended Complaint.

25 44. Defendants deny the allegations of paragraph 44 of  
26 the Third Amended Complaint.

Page 7 - ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

BULLIVANT HOUSE & BAILEY  
A Professional Corporation  
888 E.W. Fifth Avenue, Suite 300  
Portland, Oregon 97204-2088  
Telephone (503) 228-6351

08/04/98 14:07 FAX 503 224 7324

DUNN CARNEY ONE

009/012

1 45. Defendants deny the allegations of paragraph 45 of  
2 the Third Amended Complaint.

3 46. Defendants deny the allegations of paragraph 46 of  
4 the Third Amended Complaint.

5 47. Defendants deny the allegations of paragraph 47 of  
6 the Third Amended Complaint.

7 48. Defendants deny the allegations of paragraph 48 of  
8 the Third Amended Complaint and deny that Plaintiff is entitled  
9 to any relief in this matter.

10 49. Defendants affirmatively deny each and every  
11 allegation that has not been specifically admitted herein.

12 SECOND AFFIRMATIVE DEFENSE

13 This Court lacks jurisdiction over this matter and the  
14 Church Defendants, and this action violates constitutional  
15 protections under Amendments I, IV, V, and XIV of the United  
16 States Constitution, and Article I, §2, §3, §8 and §9 of the  
17 Oregon Constitution and federal and state common law.

18 THIRD AFFIRMATIVE DEFENSE

19 The Complaint fails to state a claim upon which relief  
20 can be granted.

21 FOURTH AFFIRMATIVE DEFENSE

22 Plaintiff's claims for punitive damages violate the  
23 Constitutions of the United States and Oregon and federal and  
24 state common law principles.

25 ///

26 ///

Page 8 - ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

BULLIVANT Houser BAILEY  
A Professional Corporation  
838 S.W. Fifth Avenue, Suite 300  
Portland, Oregon 97204-2088  
Telephone (503) 224-6351

08/04/98 14:07 FAX 503 224 7324

DUNN CARNEY ONE

010/012

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's Third Amended Complaint is barred, in whole or in part, by the applicable state of limitations or the equitable doctrines of waiver, estoppel and laches.

SIXTH AFFIRMATIVE DEFENSE

Defendants COP, CPB, and the Church are not proper party defendants in this matter.

SEVENTH AFFIRMATIVE DEFENSE

The injury and damages, if any, sustained by plaintiff were caused solely by the negligence or culpable conduct of entities or individuals other than Defendants.

EIGHTH AFFIRMATIVE DEFENSE

Defendants assert the defense of charitable immunity.

NINTH AFFIRMATIVE DEFENSE

No vicarious liability can be imposed upon any of the Church Defendants for any acts or omissions of any other person in connection with this matter.

TENTH AFFIRMATIVE DEFENSE

Defendants assert the defense of comparative fault in that individual and or entities other than the Defendants may have fault in causing the alleged damage suffered by Plaintiff.

ELEVENTH AFFIRMATIVE DEFENSE

Defendants assert the defense that no duty statutory or common law was owed to Plaintiff or breached in this matter.

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Page 9 - ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

GILLIVANT HOSCHER BAILEY  
A Professional Corporation  
666 S.W. Fifth Avenue, Suite 300  
Portland, Oregon 97204-2069  
Telephone (503) 228-6351

08/04/98 14:07 FAX 503 224 7324

DUNN CARNEY ONE

011/012

TWELFTH AFFIRMATIVE DEFENSE

Defendants assert the defense of potential lack of subject matter jurisdiction or diversity jurisdiction over this matter may be lacking.

DATED: August 4, 1998

BULLIVANT, HOUSER, BAILEY  
A Professional Corporation  
Telephone: (503) 228-6351

By Karen M. Vickers  
Stephen F. English, OSB 73064  
Lori R. Metz, OSB 85286  
Karen M. Vickers, OSB 91381

Attorneys for Defendants

Page 10 - ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

BULLIVANT HOUSER BAILEY  
A Professional Corporation  
668 S.W. Fifth Avenue, Suite 500  
Portland, Oregon 97204-2089  
Telephone (503) 228-6351

08/04/98 14:07 FAX 503 224 7324

DUNN CARNEY ONE

012/012

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 1998, the foregoing .  
ANSWER OF DEFENDANTS GREGORY FOSTER, THE CHURCH OF JESUS CHRIST  
OF LATTER-DAY SAINTS, CORPORATION OF THE PRESIDENT AND  
CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST  
OF LATTER-DAY SAINTS TO PLAINTIFF'S THIRD AMENDED COMPLAINT was  
served on the parties by delivering to their offices, by the  
method indicated, copies thereof addressed as follows:

Gary E. Rhoades  
Dunn Carney Allen Higgins & Tongue  
851 SW Sixth Avenue, Suite 1500  
Portland, OR 97204

HAND DELIVERY

Attorneys for Plaintiffs

Joel T. Salmi  
800 Bellevue Way NE, Ste. 300  
Bellevue, WA 98004

MAIL

Attorneys for Plaintiffs

Karen M. Vickers  
Karen M. Vickers

Attorneys for Defendants

1 - CERTIFICATE OF SERVICE

## **EXHIBIT E**

FILED

98 NOV 30 PM 3:00  
CLERK, U.S. DISTRICT COURT  
DISTRICT OF OREGON  
EUGENE, OREGON

BY \_\_\_\_\_

DOCKETED

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

JEREMIAH SCOTT,

Plaintiff,

vs.

CORPORATION OF THE PRESIDING  
BISHOP OF THE CHURCH OF JESUS  
CHRIST OF LATTER-DAY SAINTS,  
a Utah corporation sole;  
GREGORY LEE FOSTER, an  
individual; THE CHURCH OF  
JESUS CHRIST OF LATTER-DAY  
SAINTS, a Utah corporation sole;  
THE CORPORATION OF THE  
PRESIDENT OF THE CHURCH OF  
JESUS CHRIST OF LATTER-DAY  
SAINTS, a Utah corporation  
sole,

Defendants.

Civil No. 98-366-AA

OPINION AND ORDER

Gary Rhoades  
Dunn, Carney, Allen, Higgins & Tongue  
851 S.W. Sixth Avenue, Suite 1500  
Portland, Oregon 97204-1357  
Attorney for plaintiff

Stephen F. English  
Lori R. Metz  
Karen M. Vickers  
Bullivant, Houser, Bailey  
300 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, Oregon 97204-2089  
Attorneys for defendants

1 - OPINION AND ORDER

EXHIBIT

PAGE

1 OF 6

1 AIKEN, Judge:

2 Defendants Corporation of the Presiding Bishop of the Church  
3 of Jesus Christ of Latter-Day Saints, The Church of Jesus Christ  
4 of Latter-Day Saints, and the Corporation of the President of the  
5 Church of Jesus Christ of Latter-Day Saints ("church defendants")  
6 bring this motion challenging this court's diversity  
7 jurisdiction, pursuant to Fed. R. Civ P. 16(a), (c). The church  
8 defendants move this court for a determination as to whether  
9 complete diversity exists between the parties. Rule 16 permits  
10 this court to address issues at an early stage of the litigation  
11 in order to "expedit[e] the disposition of this action,"  
12 "discourag[e] wasteful pretrial activities," and address "the  
13 necessity or desirability of amendments to the pleadings." Fed.  
14 R. Civ. P. 16(a)(1), (2), and (c)(2). Specifically, the church  
15 defendants are concerned that inclusion of The Church of Jesus  
16 Christ of Latter-Day Saints ("LDS Church") may destroy diversity  
17 jurisdiction in this case.

#### 18 DISCUSSION

19 All parties agree that plaintiff is a citizen of Washington,  
20 that defendant Gregory Lee Foster is a citizen of Oregon, and  
21 that defendants Corporation of the Presiding Bishop of the Church  
22 of Jesus Christ of Latter-Day Saints and Corporation of the  
23 President of the Church of Jesus Christ of Latter-Day Saints are  
24 Utah corporations sole. To this extent, the parties agree that  
25 diversity jurisdiction exists. However, the church defendants  
26 have denied the allegation that the LDS Church is a Utah  
27 corporation sole. See Third Amended Complaint, ¶ 6; Defendants'  
28 Answer, ¶ 5. The LDS Church maintains that it is a

2 - OPINION AND ORDER

EXHIBIT 1

PAGE 2 OF 6

1 unincorporated association with millions of members worldwide.  
2 See Answer, ¶ 8. The church defendants are concerned that the  
3 LDS Church's proper status as an unincorporated association may  
4 destroy diversity jurisdiction.

5 The citizenship of an unincorporated association for federal  
6 diversity purposes is the citizenship of each of the individual  
7 members of the association. Carden v. Arkoma Assoc., 494 U.S.  
8 185, 189 (1990). The church defendants argue that, under this  
9 rule, the citizenship of the Washington members of the LDS Church  
10 must be taken into account and because the Washington members  
11 share citizenship with plaintiff, there is not complete  
12 diversity.

13 In certain circumstances, however, an unincorporated  
14 association may be deemed a citizen of a single state where there  
15 is a statute which clothes it with corporate status:

16 Whether a religious society is to be treated as a  
17 corporation or as an unincorporated association for  
18 purposes of determining its citizenship depends on  
19 state law. Where, under state statute, church  
20 officers are deemed bodies corporate and unincorporated  
21 religious societies are to have like powers as  
22 unincorporated societies with respect to gifts or grants,  
23 and may elect officers to sue for rights vesting in  
24 consequence of such gifts or grants, they are for such  
25 purposes corporations and citizens of the state for  
26 diversity jurisdiction purposes. On the other hand,  
27 where an unincorporated religious society is not  
28 treated as a corporation by statute, then it is not a  
citizen of the state in its own right, but its  
citizenship depends upon the citizenship of its members.

24 AmJur2d, Vol. 32A, § 844 (footnotes and internal citations  
25 omitted).

26 There is no Oregon or Utah statute that provides the LDS  
27 Church with corporate status, and therefore, it may not be deemed  
28 a citizen of a single state.

1 Further, courts have held that mere "capacity to sue" does  
2 not establish citizenship for diversity purposes. See Chapman v.  
3 Barney, 129 U.S. 677 (1889). The Ninth Circuit has held:

4 The citizenship of each member of an unincorporated  
5 association must be alleged, even though the entity  
6 might be recognized as having the ability to sue and  
7 the liability to be sued.

8 Fifty Associates v. Prudential Ins. Co. of America, 446 F.2d  
9 1187, 1190 (9th Cir. 1970) (internal citation omitted).

10 The plaintiff does not dispute the church defendants'  
11 argument and concedes that if the LDS Church is, in fact, an  
12 unincorporated association, complete diversity does not exist.

13 Plaintiff, however, points to an Arizona case where,  
14 plaintiff alleges, the LDS Church "admitted" that it was a "Utah  
15 corporation sole." See The Church of Jesus Christ of Latter-Day  
16 Saints v. Brown, 764 P.2d 759 (Ariz. App. 1988). The church  
17 defendants state that, in fact, the LDS Church had been sued as  
18 "The Church of Jesus Christ of Latter-Day Saints, a corporation."  
19 The LDS Church Answered that complaint by stating that the true  
20 name of this defendant is "THE CORPORATION OF THE PRESIDENT OF  
21 THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah  
22 corporation (sole)." (Capitalization in original). Plaintiff's  
23 Response Memorandum, Ex. 1, Answer, ¶ 1. There were no "judicial  
24 admissions" made by the LDS Church that it was in fact a  
25 corporation; rather, the LDS Church corrected plaintiffs'  
26 erroneous naming of the wrong defendant by answering in the name  
27 of the proper defendant in that action.

28 Further, plaintiff requests "credible documentation or  
testamentary evidence" that the LDS Church is, in fact, an

In response, the church defendants attach Certificates of Good Standing for the two defendant corporations named as parties to this lawsuit, The Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, and The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints. See Defendants' Reply Memorandum, Exs. 2, 3. Attached as Exhibit 4 is an Affidavit of Dwayne Liddell, Director of Risk Management. This Affidavit establishes that although the two previously named corporate defendants are Utah corporations sole, the LDS Church is not, rather, it "is an unincorporated religious association with a worldwide membership of approximately 10 million members, including members in all fifty states." Defendants' Reply Memorandum, Ex. 4, Liddell Affidavit at ¶ 4.

Once the defendant in a diversity suit has challenged the plaintiff's allegations of diversity of citizenship, and has met its burden of production, as the church defendants have here, the plaintiff has the burden of proving that diversity jurisdiction exists. Lee v. Moss, 797 F.2d 747, 751 (9th Cir. 1986). Plaintiff has not satisfied this burden.

## CONCLUSION

The church defendants' motion for judicial determination of diversity jurisdiction (doc. 35) is granted. Defendant LDS Church defeats diversity jurisdiction in this case. Plaintiff is allowed ten (10) days from the date of this Order to amend his

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1 complaint or to refile this action in state court. The church  
2 defendants' request for oral argument is denied as unnecessary.

3 Dated this 30th day of November 1998.  
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8 Ann Aiken  
9 United States District Judge  
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## **EXHIBIT F**

1522

741 FEDERAL SUPPLEMENT

ORDERED that the defendant's motion to dismiss be, and the same hereby is, DENIED.



CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, Douglas Bennett, Finley Eversole, Frieda Eversole & Barry Seidel

JEFFERSON COUNTY, John Katopodis, Chris McNair, David Orange, Reuben Davis & Jim Gunter.

No. CV89-PT-0711-S.

United States District Court,  
N.D. Alabama, S.D.

Feb. 7, 1990.

Church which unsuccessfully applied for rezoning to allow development of land for place of worship filed action against county alleging violation of its First and Fourteenth Amendment rights. The District Court, Propst, J., held that First and Fourteenth Amendment rights of church were violated by county's procedure for obtaining rezoning to allow development of land for churches, subject to neighborhood approval, which imposed undue burden on church and was not least restrictive means of achieving governmental purpose.

So ordered.

See also 721 F.Supp. 1212.

Constitutional Law ¶84.5(18), 278.2(1)  
Zoning and Planning ¶76

Zoning ordinance requiring church to apply for rezoning to allow development of land for place of worship, subject to neighborhood approval, violated the First and

1. When the County Commission rezoned the South Central Bell tract, across the Cahaba River Road from the "Eversole tract," it required a

Fourteenth Amendment rights of church; rezoning application process was unduly burdensome and not the least restrictive means of accomplishing the governmental purpose, which could be achieved by establishing zoning areas available to all churches or, at least, having objective standards for making the rezoning determination. U.S.C.A. Const.Amends. 5, 14; Ala. Code 1975, § 22-27-40 et seq.

Donald H. Brockway, Jr., Douglas P. Corretti, Mary D. Hawkins, James R. Scalco, Corretti & Newsom, Birmingham, Ala., for plaintiffs.

Charles S. Wagner, Jeffrey Monroe Sewell, Asst. County Attys., Birmingham, Ala., for defendants.

PROPST, District Judge.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### *Findings of Fact*

This cause came on to be heard at a bench trial. After considering the facts suggested by the parties, objections thereto, and the court's own copious notes, the court finds the following facts:

Plaintiff The Church of Jesus Christ of Latter-Day Saints ("LDS") entered into a contract to purchase from plaintiffs Finley Eversole and Freida S. Eversole ("the Eversoles") a parcel of real estate containing approximately eleven acres located at the northwest corner of Altadena Road and Cahaba River Road (Old U.S. Highway 280—Florida Short Route) in an unincorporated area of Jefferson County, Alabama. Said tract of land adjoins a single family residential subdivision, and is relatively near U.S. Highway 280 (a four lane highway), and Interstate Highway I-459 and is approximately one-fourth mile from the Alabama State Offices of South Central Bell (Colonnade)<sup>1</sup> and the Colonnade commercial, office and retail development and,

strip of residential zoning along Cahaba River Road and permitted no access from the South Central Bell property to Cahaba River Road.

BEST IMAGE POSSIBLE

1212

721 FEDERAL SUPPLEMENT

at the time the federal tax liens were filed. Although the mortgage when originally filed may have been deemed perfected under state law, such a conclusion is not binding upon the United States when asserting priority of its tax liens. See generally Annotation, *Federal Tax Lien-Competing Liens*, 94 A.L.R.2d 748, 760 (1964). The court finds there is no genuine issue of material fact concerning the priority of the federal tax liens. Accordingly,

IT IS HEREBY ORDERED that the Government's motion for summary judgment declaring its federal tax liens superior to the defendant's mortgage be, and the same hereby is, GRANTED.



The CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS, et  
al., Plaintiffs,

v.

JEFFERSON COUNTY, ALABAMA, et  
al., Defendants.

Civ. A. No. 89-AR-0711-S.

United States District Court,  
N.D. Alabama, S.D.

Sept. 23, 1989.

Vendors of property and purchaser, a church, brought action challenging denial of zoning change to all construction of worship facility on the property. The District Court, Acker, J., held that: (1) no claim for denial of substantive due process could be asserted against persons making zoning decision; (2) there was no taking without just compensation; (3) there was no showing of equal protection; but (4) genuine issue of material fact existed as to whether there had been a violation of church's First Amendment rights.

Ordered accordingly.

#### 1. Zoning and Planning ⇐351, 610

Elected officials who vote on zoning request can act for purely political reasons as partisan, political decision making, even by unknowledgeable, closed-minded politicians fearful of harm more than political is automatically deemed rational and thus cannot be arbitrary and capricious unless it is the product of corruption, i.e., the result of an outright bribe, as contrasted to some "legitimate" promise to deliver votes or some "legitimate" threat to withhold votes or to harass the politician "legitimately."

#### 2. States ⇐4.2

Fourteenth Amendment siphoned and made applicable to the states the Fifth Amendment prohibition against the taking of private property by a governmental entity without the payment of just compensation and unless due process is afforded. U.S.C.A. Const.Amends. 5, 14.

#### 3. Eminent Domain ⇐2(1.2)

There is no taking of property as a result of zoning decision where the property, as zoned, has substantial value and can be exploited economically. U.S.C.A. Const. Amend. 14.

#### 4. Eminent Domain ⇐277

Property owners who had not pursued state claim of inverse condemnation had not exhausted their remedy before bring § 1983 action claiming an unconstitutional taking without compensation. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 5.

#### 5. Constitutional Law ⇐228.2

##### Zoning and Planning ⇐167

There was no denial of equal protection to those seeking change of zoning to permit construction of worship center in residential area where all applicants for rezoning of property for future construction and operation of a worship center on residential property are turned down. U.S.C.A. Const.Amend. 14.

#### 6. Constitutional Law ⇐274(3)

Fourteenth Amendment incorporates the First Amendment and guarantees the right to exercise religion freely. U.S.C.A. Const.Amends. 1, 14.

**CHURCH OF JESUS CHRIST v. JEFFERSON COUNTY, ALA. 1213**  
 Cite as 721 F.Supp. 1212 (N.D.Ala. 1989)

**7. Constitutional Law §42.2(1)**

Vendors of property which purchasers wished to use for construction of worship center did not assert violation of First Amendment rights by denial of zoning change and did not have standing to challenge denial on that basis. U.S.C.A. Const. Amend. 1.

**8. Constitutional Law §42.2(1)**

Church which sought to purchase property and to build worship center thereon had standing to complain of violation of First Amendment rights by denial of zoning, even though it did not yet have title to the property. U.S.C.A. Const. Amend. 1.

**9. Federal Civil Procedure §2491.5**

Genuine issues of material fact precluding grant of summary judgment existed as to whether there was a violation of church's First Amendment rights by denial of zoning change for property on which church sought to construct worship center. U.S.C.A. Const. Amend. 1.

Douglas P. Corretti, Mary D. Hawkins, James R. Scalco, Corretti & Newsom, Birmingham, Ala., for plaintiffs.

Jeffrey Monroe Sewell, Birmingham, Ala., for defendant Jefferson County, Ala.

Charles S. Wagner, Asst. County Atty., Birmingham, Ala., for all other defendants.

**MEMORANDUM OPINION**

ACKER, District Judge.

This court has for consideration a motion to dismiss or, in the alternative, a motion for summary judgment filed by defendants, Jefferson County, Alabama; David Orange; Reuben Davis; Jim Gunter; John Katopodis; and Chris McNair. The individual defendants are members of the Jefferson County, Alabama, Commission, the governing body of Jefferson County, and are sued in their representative capacities. The court will consider this motion as one invoking Rule 56, F.R.Civ.P.

*Pertinent Undisputed Facts*

Plaintiffs Finley Eversole and Frieda Eversole own real property located in an unincorporated area of Jefferson County, Alabama. Plaintiff, The Church of Jesus Christ of Latter-Day Saints (herein "Church"), entered into a contract with the Eversoles to purchase their said property contingent on obtaining a zoning classification which will permit the construction of a worship facility. Plaintiffs Barry W. Seidel and Douglas Bennett are members of the Church. The Church wishes to construct and maintain a sanctuary and allied structures. The Eversoles' property is zoned E-1 (Estate Residential). Jefferson County's zoning ordinance does not allow churches to be constructed or maintained in an E-1 zone. Consequently, the Church and the Eversoles sought to have the property rezoned to a classification which would permit a place of worship.

Defendants concede that Jefferson County's zoning scheme permits churches only in an Institutional-1 (I-1) zoning district. In other words, to construct a church a property owner must either own property now located within an I-1 zone or have its classification changed to I-1. Defendants do not contradict plaintiffs' allegation that Jefferson County now contains no unoccupied property zoned I-1. Therefore, any proposed new church location in Jefferson County would necessitate a zoning change. (Complaint at 3). In compliance with the procedure provided by state law and the zoning ordinance, plaintiffs applied to the Jefferson County Planning and Zoning Commission to rezone this property. After a hearing, the Planning Commission unanimously recommended to the Commission that plaintiffs' application for rezoning be approved. The Commission then held its own public hearing on April 4, 1989, in accordance with required procedure. Rejecting the recommendation of the Planning Commission, the Commission denied plaintiffs' application for rezoning on a 3-2 vote.

After the Commission's action, plaintiffs filed their complaint in this court, invoking 42 U.S.C. § 1983. They allege the violation

Citation  
882 P.2d 1106  
(Cite as: 882 P.2d 1106)

Found Document

Rank 1 of 1

Database  
OK-CS

Harold Ralph STOTTS, Esther Elizabeth Stotts, individually and as parents and  
next friend[s] of Matthew John Stotts, a minor, Plaintiffs,  
v.  
CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS and Gregory Louis Turner,  
Appellants and Third-Party Plaintiffs,

v.  
LINDSEY CONSTRUCTION CO., INC., and Advanced Warnings, Inc., Appellees.  
No. 83931.

Released for Publication by Order of the Court  
of Appeals of Oklahoma, Division No. 1.

Court of Appeals of Oklahoma,  
Division No. 1.  
Sept. 13, 1994.

In personal injury action arising from automobile accident, defendants filed combined answer and third-party petition in which they denied they were negligent and also impleaded construction company and sign company, alleging that they had been negligent in manner that they warned motorists about ongoing construction work on street where accident occurred. The District Court, Muskogee County, William H. Bliss, J., granted third-party defendants' motions to dismiss third-party complaint. Defendants appealed. The Court of Appeals, Jones, J., held that: (1) fact that defendants denied all liability for negligence alleged by plaintiff did not preclude defendants' third-party claim for contribution, and (2) construction company waived any argument it may have had that third-party petition failed to state cognizable claim for contribution.

Reversed and remanded.

Stotts v. Church of Jesus Christ of Latter Day Saints

[1]

96 CONTRIBUTION

96k9 Actions

96k9(.5) k. In general.

Okl.App., 1994.

Third-party plaintiff need not state present claim for relief against third-party defendant; rather, applicable statute requires only that third-party defendant "is or may be liable" to third-party plaintiff "for all or part of" liability that plaintiff in main action seeks to establish. 12 Okl.St. Ann. § 2014, subd. A.

Stotts v. Church of Jesus Christ of Latter Day Saints

[1]

96 CONTRIBUTION

96k9 Actions

96k9(3) k. Time for bringing action.

Okl.App., 1994.

Third-party plaintiff need not state present claim for relief against third-party defendant; rather, applicable statute requires only that third-party defendant "is or may be liable" to third-party plaintiff "for all or part of" liability that plaintiff in main action seeks to establish. 12 Okl.St. Ann. § 2014, subd. A.

Stotts v. Church of Jesus Christ of Latter Day Saints

[2]

287 PARTIES

287IV New Parties and Change of Parties

287k49 Bringing in New Parties

882 P.2d 1106  
(Cite as: 882 P.2d 1106)

Page 9

287k56 k. Proceedings in cause after adding parties.  
Okla.App., 1994.

Combined answer and third-party petition is not subject to dismissal merely because it includes both denial of negligence in answer to plaintiff's allegations, and assertion of contribution rights over against third-party defendant. 12 Okla.St. Ann. §§ 2008, subd. E, par. 2, 2014, subd. A.

Stotts v. Church of Jesus Christ of Latter Day Saints  
[3]

287 PARTIES

287IV New Parties and Change of Parties

287k49 Bringing in New Parties

287k56 k. Proceedings in cause after adding parties.  
Okla.App., 1994.

Third-party petition, just as original petition, should not be dismissed for failure to state claim unless it appears beyond doubt that third-party plaintiff can prove no set of facts in support of its claim that would entitle third-party plaintiff to relief. 12 Okla.St. Ann. § 2014, subd. A.

Stotts v. Church of Jesus Christ of Latter Day Saints  
[4]

287 PARTIES

287IV New Parties and Change of Parties

287k49 Bringing in New Parties

287k56 k. Proceedings in cause after adding parties.  
Okla.App., 1994.

By delaying its quest for dismissal of third-party petition beyond date it answered, and by omitting its grounds for dismissal from its answer, third-party defendant waived any argument it may have had that third-party petition failed to state cognizable claim for contribution. 12 Okla.St. Ann. § 2012, subd. F, par. 1b.

\*1107 Appeal from the District Court of Muskogee County; William H. Bliss, District Judge.

REVERSED AND REMANDED.

Dan S. Folluo and Edward J. Main, Secrest, Hill & Folluo, Tulsa, for appellants.

Ronald D. Wood, Ronald D. Wood & Associates, Tulsa, for appellee, Advanced Warnings, Inc.

Stephen C. Wilkerson, Knight, Wilkerson & Parrish, Tulsa, for appellee, Lindsey Const. Co., Inc.

#### MEMORANDUM OPINION

JONES, Judge:

On May 4, 1992, a vehicle driven by Harold Ralph Stotts collided with a vehicle driven by Gregory Turner. Turner was driving a vehicle on behalf of the Church of Jesus Christ of Latter Day Saints ["Church"]. Stotts sued Turner and Church for negligence. Church and Stotts filed a combined answer and third-party petition in which they denied they were negligent and also impleaded Appellees Lindsey Construction Company and Advanced Warnings, Inc. Appellants' third-party petition alleged Lindsey Construction and Advanced Warnings had been negligent in the manner that they warned motorists about ongoing construction work on the street where the accident occurred, and in other respects which would be disclosed by discovery. Advanced Warnings moved to dismiss Church's third-party petition, arguing that a third-party claim for contribution will not lie when the third-party plaintiff denies all liability for the negligence alleged by the plaintiff. The trial court granted the motion. Appellants filed a motion for new trial to challenge that ruling. Lindsey Construction, which had previously answered and cross-claimed against Advanced Warnings, then filed its own motion to dismiss, relying on the arguments and authorities previously made by Advanced Warnings. The trial court, by combined order, granted Lindsey Construction's motion to dismiss, and denied Appellants' motion for new trial.

882 P.2d 1106  
(Cite as: 882 P.2d 1106, \*1107)

Page 10

We hold that Appellants' third-party petition stated a claim against Advanced Warnings and Lindsey Construction, and the trial court erred by dismissing the third-party petition.

Third-party practice in Oklahoma is governed by the following general provision of the Pleading Code:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and petition to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him or who is liable to him on a claim arising out of the transaction or occurrence that is the subject matter of a claim that is asserted against him....

12 O.S.1991 § 2014(A).

[1] A third-party plaintiff need not state a present claim for relief against third-party defendant(s). Section 2014 requires only that the third-party defendant "is or may be \*1108 liable" to the third-party plaintiff "for all or part of" of the liability which the plaintiff in the main action seeks to establish. Third-party practice in this way "accelerates" the presentation of the comparative rights between third-party plaintiff and third-party defendant. See 3 Moore's Federal Practice ¶ 14.08 (1994). Impleader "may also accelerate the right of contribution among joint tortfeasors even though such right is 'inchoate, unascertainable and contingent until [the joint tort-feasor] pays more than his proportionate share of the common liability.'" *Id.*, at 14-61 [footnote omitted]; *Oklahoma Gas & Electric Co. v. District Court*, 784 P.2d 61, 66 n. 22 (Okla.1989).

Contribution among joint tortfeasors is a right which exists "even though judgment has not [yet] been recovered against [the joint tortfeasor]." The fact that a claim for contribution may not accrue until the judgment's rendition does not bar the earlier assertion of the claim. The right of contribution may be asserted before judgment as either a permissive counterclaim, crossclaim, or as a third-party action.

*Id.*, 784 P.2d at 67.

Appellees misread this Court's decision in *Daugherty v. Farmers Cooperative*

# BULKY SUB

CASE # 06-2-18131-0 KNT

SEGMENT 2 OF 2